

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 19.4.2011*
Judgment Delivered on: 26.4.2011

+ **RSA No.346-351/2006**

SMT.CHANDER KANTA GARG & ORS. Appellant
Through: Mr.Harish Malhotra, Sr. Advocate
with Mr. B.L.Wali, Advocate.

Versus

SH.K.S.CHUGH & ORS. Respondents
Through: Mr.H.L.Tikku, Sr.Advocate with
Mr.Naveen Chawla for respondent
no.1.
Mr.Vijay Kishan, and Mr.Vikram
Jetly, Advocates for respondent no.2.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. Present appeal has impugned the judgment and decree dated 08.8.2006 which had reversed the finding of the trial judge dated 26.2.1982. Vide judgment and decree dated 26.2.1982 the suit filed by the plaintiff Chaner Kanta Garg seeking perpetual

injunction against defendant no.1 (K.S.Chugh) restraining him from raising any construction on part of plot no.EC-31, Inderpuri Colony (as depicted in the site plan Ex.PW-10/3) had been decreed in his favour. The impugned judgment had reversed this finding; the suit of the plaintiff stood dismissed.

2. The case of the parties as borne out from the pleadings is as under:

i. The Engineering Industrial Corporation Limited (defendant No.2) had acquired and purchased an area of 146 bighas 15½ biswas in various khasra in Village Naraina, Delhi and converted this land into a built up colony (hereafter referred to as the Inderpuri Colony).

ii. Defendant no.2 sold plot No.EC-31(500 sq. yards) vide registered sale deed dated 22.8.1952 to Smt. Bhagwan Devi (defendant no.3). Possession of the same was handed over to defendant no.3).

iii. Vide registered sale deed 16.10.1957 defendant no.3 sold this plot of land to Sampat Rai Mishra and Dr.Shanti Swarup Gaur (defendant No.4 & defendant no.5). Possession of the same was handed over to them.

iv. On 28.4.1959 Jagdish Prasad Garg (plaintiff) vide registered sale deed of the aforementioned date purchased this

plot of land from defendants no.4 and 5. Possession of the same was delivered to the plaintiff.

v. Plaintiff is a bonafide purchaser and owner in possession of the aforementioned plot; it has a 30 ft. wide road in its northern side and 20 ft. wide road and nallah on eastern side with a service lane in the south.

vi. Plaintiff had filed suit No.484/1961 seeking permanent injunction against the Municipal Corporation of Delhi (MCD) as they were threatening to interfere in the peaceful enjoyment of the said plot. On the statement made by the defendant that they would not interfere with this suit land, the suit of the plaintiff was decreed on 22.2.1967.

vii. On 22/11/1971, the plaintiff learnt that the defendant no.1 was illegally excavating earth on his plot for the purpose of digging a foundation for making a building. In spite of requests defendant did not stop this activity.

viii. Present suit was filed on 27.11.1971.

ix. In the written statement of defendant no.1 it was stated that there is no plot No.EC-31 in the Inderpuri layout plan. Suit is not maintainable. The alleged sale if any in favour of the plaintiff by defendants no.4 and 5 is illegal as there

being no plot No.EC-31 in existence on 28.4.1959; sale of

the said plot does not arise. Even otherwise in the revised layout plan plot No.EC-19 to 31 have been earmarked for a primary school.

x. Defendant no.2 had also relied upon the revised layout plan which had been sanctioned by the DDA in 1957. The contention being that the in this revised layout plan plot No.EC-31 had ceased to exist; it was contended that the plaintiff was bound by the layout plan and he should have verified the antecedents of the property before purchase.

xi. Defendant no.3 had died during the pendency of the proceedings; she was dropped from the array of the parties.

xii. Defendants no.4 and 5 admitted that they had sold the aforenoted plot to the plaintiff vide sale deed dated 28.4.1959.

xiii. On the pleadings of the parties, the following issues were framed:

1. Whether the plaintiffs suit for injunction is not maintainable? OPD
2. Whether the plaintiff is bonafide purchaser in possession of the land in dispute? If so its effect? OPP
3. Whether suit is barred by order 2 Rule 2 and principles of res judicata? OPD
4. Whether suit is barred u/s 51 & Sec.53 of DDA Act and this court has no jurisdiction to try the suit? OPD
5. Whether the suit is bad for non-joinder of necessary

parties? OPD

6. Whether the sale of plot no.EC-31 by defendant no. 2 in favour of defendant no.3 became frustrated and void as alleged by the defendants in para 2 & 3 of the W.S. of defendant no.2 and para 6 of WS of defendant no.1?OPD

7. Whether the suit is barred by time? OPD

8. Whether the plaintiff is entitled to the enjoyment of 20 feet wide road on account of his ownership of plot no. EC-31 as alleged in plaint? OPP

9. Whether the suit has been properly valued for purpose of court fee and jurisdiction? OPP

10. Relief.

ivx. Oral and documentary evidence was led. Trial judge decided all issues in favour of the plaintiff holding that the revised layout plan which was a creation of defendant no.2 could not have been revised to the disadvantage and to the detriment of the earlier purchasers; this plot of land had been sold by defendant no.2 to defendant no.3 on 22.8.1952 who in turn had sold it to defendants no.4 and 5 on 16.10.1957; on 28.4.1959 vide registered sale deed plaintiff had purchased this property from defendants no.4 and 5. Sale deed set up by defendant (Ex.DW-1/1) is dated 11.8.1962 and was later in time; plaintiff was entitled to the relief claimed for by him. His suit was decreed.

vx. Impugned judgment has reserved this finding. The impugned judgment had noted that in terms of the

Resolution dated 9.10.1957 the revised layout plan of Inderpuri Colony had been approved; in terms of the aforementioned revised layout plan plot No.EC-31 was no longer in existence; this was evident from the site plan which had been filed along with the revised layout plan (Ex.PW-10/3).

3. This is a second appeal. It has been admitted and on 10.1.2011 the following substantial question of law has been formulated:

“Whether the finding in the impugned judgment dated 08.8.2006 reversing the finding of the trial judge are perverse? If so, its effect?”

4. On behalf of the appellant arguments have been heard at length. It is pointed out that the impugned judgment suffers from a perversity on every score. Attention has been drawn to the finding returned in the impugned judgment. It is pointed out that the factual averments noted therein are all incorrect; the impugned judgment has wrongly noted that the plaintiff has not filed his site plan to show his extent of possession. It is submitted that the site plan had been filed by the plaintiff along with the plaint and has been proved as Ex.PW-3/A which was a plan which had been annexed along with the original sale deed i.e. the sale deed dated 22.8.1952. Attention has been drawn to the said site plan. The disputed plot EC-31 has been depicted on the right

site; in front of this plot there is 20 feet wide road. It is pointed out that in the subsequent site plan Ex.PW-10/3 which has been filed along with the revised layout plan, there is a longitudinal line in this plot EC-31; this plan depicts that half of this plot of land (EC-31) and the 20 feet wide road has been carved out by the colonizer subsequently to make it into plot No.119A which is the disputed plot purported to have been purchased by the defendant. The finding in the impugned judgment that the plaintiff has nowhere stated that he is in physical possession of the suit property is also perversity. Attention has been drawn to the plaint wherein in paras 5 and 6 there is a specific averment that the plaintiff is in possession of the suit property. Finding in the impugned judgment that the date of encroachment has not been given is also mis-quoted; it is pointed out that in the plaint there is no specific averment that the defendant no.1 had started excavation of the earth and started digging foundation therein on 22.11.1971. It is pointed out that the finding in the impugned judgment that defendant no.2 had informed defendant no.3 vide letter dated 10.9.1963 that in the revised layout plan, the plot No.EC-31 has ceased to exist has never been proved on record. Defendant no.1 had constructed the building and got the plan sanctioned from the MCD only under the order of the High Court.

Attention has been drawn to the order of the High court dated 13.3.1973 passed in Civil Revision No.19/1973. Statement of the parties was recorded therein. The relevant extract reads as follows:

“The counsel for Shri K.S.Chugh, first defendant-respondent has given an undertaking that in the event of the plaintiff succeeding in establishing his right to the land in dispute in the suit, he will demolish the superstructure erected on the land in dispute between the plaintiff and the first defendant without any objection and subject himself to a mandatory injunction by the Court below for its demolition. He has further undertaken that he would carry out the construction on the land in dispute at his own risk and would not raise the objection that the construction has, since the institution of the suit, has been completed and so the suit has become infructuous.

The counsel for the plaintiff-petitioner has accepted the same and has prayed that in view of his acceptance of the undertaking, no injunction need be granted and he does not want to press the application for injunction. The revision petition is accordingly disposed of with no order as to costs.”

It is pointed out that it was under the orders of the High Court only that defendant no.1 had got the plan sanctioned from the MCD and had started construction therein. This was subject to the specific undertaking given by the defendant that in case the plaintiff succeeds the plaintiff would be entitled to a mandatory injunction seeking demolition of this construction. The finding in the impugned judgment on the letters dated 3.2.1979 and

08.3.1979 has also been adverted to. These were both communications written by the MCD to the plaintiff asking him for the price which is acceptable to him for his plot No.EC-31, Inderpuri Colony. Contention of the plaintiff is that these letters were addressed by the Land and Estate Department of the MCD in the year 1979 meaning thereby that plot No.EC-31 was evidently in existence at that time. Finding returned in the impugned judgment that this plot of land had ceased to exist in 1957 is clearly a perverse finding. Attention has been drawn to that para of the impugned judgment wherein the impugned judgment has noted that the contention raised in the earlier suit i.e. Suit No.484/1965 is that plot EC-31 has ceased to exist is again a perverse finding. The plaint of suit No.484/1965 has been perused; it has been proved as Ex.PW-10/2. This was a suit for permanent injunction which has been filed by the plaintiff against the MCD, Delhi. Contention was that the plaintiff apprehended that the defendant no.1/MCD was threatening to interfere with the possession of the plaintiff. This plaint is dated 17.8.1965. Statement of the parties including that of the MCD had been recorded, in terms whereof decree dated 22.6.1967 was passed. This was pursuant to the statement made by the defendant corporation that they will not interfere in the plot in suit except

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after acquiring it lawfully. The order dated 22.2.1967 reads as under:

“As per statements above the suit of plaintiff is decreed for permanent injunction against defendant 1 restraining it from interfering with the plaintiff’s possession of the suit land except under due process of law. As defendant 1 had been contesting the suit all the time, it will pay the costs of the suit to plaintiff. Other defendants are left to bear their own costs.”

The contention of the plaintiff is that even in 1967, the defendant no.1 had been restrained from interfering in the plaintiff’s possession; meaning thereby that the plaintiff in the year 1967 was admittedly in the possession of the suit land. Learned counsel for the appellant has also drawn the attention of this Court to the communication dated 29.3.1972 addressed by defendant no.2 to the Manager of the Land and Estate Department of Municipal Corporation of Delhi. This document was proved through the testimony of PW-1 as Ex.PW-4/1. The relevant extract of the aforestated letter is reproduced herein below:

“THE ENGINEERING
& INDUSTRIAL CORPORATION
PRIVATE LIMITED

Engineers Phone 581266
Industrialists 29 South
Patelnagar, Contractors Delhi-9

March 29 1972

Ref. No. .../11-39-

The Manager

The Manager,

Land & Estate Department,

Municipal Corporation of Delhi,

DELHI

Dear Sirs,

Subject: Handing over all utility sites in Inderpuri Colony
free of cost to the Corporation.

.....

1.

2. We have no objection to the handing over of the undisputed public utility sites in the Colony to the Corporation subject to the following observation:

(i) The present layout of the Colony needs some corrections as already pointed out to the Town Planning Department vide our letter No.IP11/3/396 dated 12.5.69 and their approval to set right with mistakes pointed out in still awaited.

With regard to school Sites, the following plots were sold and registered long before the Delhi Development Authority came into existence and this position was brought to the notice of the D.D.A. while submitting the layout plan as per their directions, Anyhow, the latest positions of the disputed plots is given below:

1. HIGHER SECONDARY SCHOOL SITE.

Sl.No.	Name of the owner	Plot No.	Area	Sold & Regtd. on.
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--1	2	3	4	5
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		C/20	500 Sq. Yds.	15.12.52
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1.	Sh.K.C.Naithal, 8A/7, WEA, Karol Bagh, New Delhi.			
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2.	I.P.Mathur 3674, Mohalla Qutab Begum	C/23	----do----	13.9.56
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Charkhewalan Delhi

II.PRIMARY SCHOOL SITE

Sl.No.	Name of the owner	Plot No.	Area	Sold & Regtd. on
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--1	2	3	4	5
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1.	Shri Sohanlal, Christian Colony	EC/22	500 Sq. Yds.	22.3.56
2.	Smt.Padma Madan, C/o Dr.C.Wazir Madan, Pathankote	EC/27	-----do-----	7.2.56
3.	Miss M.Benjamin, C/o Mr.C.K.Samuel, Inderpuri, Colony	EC/30	-----do-----	1.11.55
4.	Smt.BhagwanDevi, 13580, Shidipura, Delhi	EC/31	-----do-----	28.8.52

As per statement of plots given above, the possession of the above plots can be given by us to you.

We would request you to take up with the authorities concerned to regularise matter in view of the position as explained above. In the meantime, we have no objection to our taking over such of the sites as they are.

Thanking you.

Yours faithfully,

For the Engineering & Industrial Corporation Private, Limited
SD.Sn Dutta,
Managing Director
(Surya Narain Dutt.)

Contention of the appellant is that admittedly even as per this communication dated 28.3.1979 defendant no.2 had sold this plot i.e. CE-31 to defendant no.3 on 28.5.1952; possession of the

same had been handed over; in this contingency defendant no.2 could not hand over the possession of this plot of the land to the MCD. This finding returned in the impugned judgment holding that there was no plot No.EC-31 after the revised layout plan of 1957 is clearly a perversity. It calls for interference on all counts. Attention has also been drawn to the finding on issue no.6. It is submitted that the finding returned that the sale of the plot by defendant no.2 in favour of defendant no.3 had been frustrated is clearly a wrong proposition of law. Attention has been drawn to the provisions of Section 56 of the Indian Contract Act, 1872; it is pointed out that this provision of law makes a reference to an agreement and not to a completed contract; it is pointed out that a contract which is yet to be completed can alone be frustrated and not a contract which already stands completed. For this proposition reliance has been placed upon AAIR 1968 SC 1024 Raja Dhruv Chand Vs. Raja Harmohinder Singh as also another judgment of the Apex Court reported in 1971 (2) SCC 288 Smt.Sushila Devi Vs. Hari Singh. It is pointed out that the doctrine of frustration as contained in Section 56 of the Contract Act would not apply to a completed transfer which in the instant case was the registered sale deed executed by defendants no.4 and 5 in favour of the plaintiff. The finding on this score is an illegality.

For all the aforestated reasons the impugned judgment is liable to be set aside.

5. Arguments have been countered. On behalf of respondent no.1, it is pointed out that the judgment suffers from no infirmity. The layout plan had been revised under a statutory enactment; in the absence of this revised layout plan no building activity could be carried out in Inderpuri Colony. It is pointed out that vide letter dated 10.9.1963 (Ex.D2W1/1) which was a letter written by defendant no.2 (the colonizer) to defendant no.3 Bhagwan Devi, the erstwhile purchaser, of this plot), defendant no.2 had informed her that it had become necessary to obtain a revised layout plan as the Delhi (Control of Building Operation) Ordinance of 1955 provided that no layout of any colony is valid unless it is approved; this letter had pointed out that as per the revised layout plan plot No.EC-31 of Bhagwan Devi has ceased to exist on account of the site having gone over to a primary school; the sale in favour of Bhagwan Devi therefore stood frustrated; she was entitled to a refund of the price which she had paid. Attention has also been drawn to the communication dated 03.2.1979 and 08.3.1979 written by the Assistant Commissioner (Land and Estate), MCD to the plaintiff asking him to inform the department the lowest price which is acceptable to him for his plot EC-31,

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Inderpuri Colony. It is pointed out that the plaintiff had all along known the fact that a primary school had been not only earmarked at his site in the revised layout plan but it had also been constructed and was in existence at the site. For this proposition attention has been drawn to testimony of PW-4, PW-8 and PW-10 (who was the plaintiff himself). It is pointed out that in these circumstances it can nowhere be said that the plaintiff was a bonafide purchaser of this plot in issue; Bhagwan Devi (who was the successor-in-interest of the plaintiff) had been informed way back in September 1963 that her plot had ceased to exist. The revised layout plan had been sanctioned by the resolution of 19.10.1957 which was prior in time to the purchase of the plot by the plaintiff; this should have been known to the plaintiff before he made his purchase in 1959; the impugned judgment on no count suffers from any infirmity. It does not call for any interference.

6. Arguments have also been addressed by respondent no.2. It is pointed out that respondent no.2 (colonizer) was only a proforma party and no relief had been sought against him. Attention has been drawn to the prayer clause of the plaint where the relief sought is against defendant no.1 only; the cause of action also does not attribute any role to defendant no.2. Counsel
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for the respondent no.2 has placed reliance upon judgment of the Apex Court reported in JT 2010(6) SC 41 Ghaziabad Development Authority Vs. Ugrasen (D) By Lrs. and AIR 2010 SC 3753 Pyare Mohan Lal Vs. State of Jharkhand. It is pointed out that a relief not claimed cannot be granted by the Court. No relief has been claimed against respondent no.2. For the same proposition reliance has also been placed upon JT 1999(7) 427 T.H. Musthaffa Vs. M.P.Varghese & Ors. On the scope of Section 100 of the Code reliance has been placed upon JT 2006(5) SC 72 Gurdev Kaur & Ors. Vs. Kaki & Ors. and JT 2009(4) SC 62 Narayanan Rajendran & Anr. Vs. Lekshmy Sarojini & Ors. It is pointed out that the scope of the High Court to interfere in a second appeal is circumscribed by this statutory provision. Unless and until a substantial question of law has arisen no interference is called for. No substantial question of law has arisen in the instant case.

7. Record has been perused.

8. The present suit out of which this second appeal has emanated is the second round of litigation between the parties. Admittedly a suit No.481/1965 was the first suit which had been filed on 13.8.1965. This was a suit for injunction and the MCD had been arrayed as the defendant. This suit had been decreed on 22.2.1967 (Ex.PW-10/1). Statement of the counsel for both the

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parties had been recorded. Counsel for the MCD had made a statement that they would not interfere with the possession of the plaintiff unless the possession is lawfully acquired by them; their contention was that in the revised layout plan this plot has been earmarked for a school. On this statement made by the learned counsel for the MCD, the suit of the plaintiff had been decreed.

9. The present suit i.e. suit No.975/1981 had been filed on 27.11.1971 i.e. six years later; this was also a suit for injunction. MCD was not a party in the present suit. There were five defendants of whom defendant no.1 was the actual contesting defendant. The averments in the plaint including cause of action and the prayer clause shows that the relief claimed by the plaintiff was against the defendant no.1 only. Contention of the plaintiff was that the plaintiff was the owner and in possession of plot No.EC-31. He had purchased it vide registered sale deed dated 28.4.1959 from defendant nos.4 and 5 namely Sampat Rai Mishra and Dr. Shanti Swarup Gaur. The defendants no.4 and 5 had in turn purchased it vide a registered sale deed dated 16.10.1957 from Bhagwan Devi who has been arrayed as defendant no.3. Defendant no.3 had purchased it vide a registered sale deed dated 22.8.1952 from defendant no.2 the colonizer i.e. the Engineering Industrial Corporation Limited. The cause of action has been

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detailed in para 13. It states that in or around 22.11.1971 defendant no.1 had started digging a foundation over the plot; when the plaintiff came to know about it, present suit was filed on 29.11.1971 seeking a restraint against defendant no.1 from in any manner interfering with his possession. Relief claimed was against defendant no.1 alone. No relief was claimed against any of the other defendants. In the written statement filed by defendant no.1, his contention was that he was the purchaser of this plot in terms of a sale deed dated 11.8.1962. This sale had been effected in his favour by defendant no.2 i.e. the Engineering Industrial Corporation Limited qua plot No.C-119A. Contention of the contesting defendant no.1 was that in the revised layout plan which had been revised on 09.10.1957 plot No.EC-31 has ceased to exist and this plot had been taken over by the MCD for the purpose of a primary school; what defendant no.1 had purchased was plot No.C-119A; further defence of defendant no.1 was that he had obtained sanction of his building plans on 5.4.1971 and the purported digging activity being conducted by him on 22.11.1971 was illegal; he was legally entitled to dig foundation of his plot as he had the sanctioned plan in terms of sanction granted to him on 05.4.1971.

10. The trial judge framed 10 issues. On the basis of the oral
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and documentary which was led before him which included ten witnesses on behalf of the plaintiff and four witnesses on behalf of the defendant, the suit of the plaintiff stood decreed. Trial judge was of the view that plaintiff was a bonafide purchaser of plot No.EC-31; Ex.PW-4/1 which was a letter dated 29.3.1972 written by defendant no.2 to the Estate Department of the MCD was heavily relied upon to hold that defendant no.2 had admitted that plot No.EC-31 had been sold to Bhagwan Devi on 28.8.1952 and possession of the same had also been given. The trial judge was of the view that in this view of the matter the colonizer could not have got the plan revised to the disadvantage of an earlier purchaser; plaintiff was entitled to the relief of permanent injunction; suit was decreed in his favour. While adverting to this letter Ex.PW-4/1, the trial judge has omitted to note that para 2 clearly stated that the Authorities concerned have already taken possession of the said plot for a primary school and have even constructed a building thereupon; meaning thereby that in 1972, the building of the primary school was already in existence. PW-10 was the plaintiff himself. He had admitted that in 1960 he had applied for a loan for building on this plot when he learnt that this was an unapproved colony; in 1961 he came to know that the revised layout plan had been sanctioned and this plot has been

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earmarked for a school. PW-10 admitted that he did not give any notice to the colonizer as to how his plot has come into the school; he had admittedly not challenged the layout plan. Plaintiff had also appeared PW-3 in an earlier suit i.e. Suit No.243/1952 wherein in his deposition recorded on 08.11.1960 he had admitted that a revised layout plan was in existence. PW-8 who was the Junior Engineer of the MCD has admitted that Plot No.EC-31 has come into the school; EC-19 to EC-31 had all been included into the school; in the revised payout plan two plots were created of which plot No.C-119A belonged to defendant no.1; in this revised layout plan EC-31 was deleted along with EC-28, EC-29 and EC-30; he has admitted that the colonizer has informed the plot owners and paid compensation to some of them. He has also deposed that plot No.119A was not carved out of EC-31.

11. Resolution dated 09.10.1957 (Ex.D1W3/1) is the Resolution of the Delhi Development Provisional Authority wherein the layout plan of Inderpuri makes a reference to the primary school; the Standing Committee had approved the revised layout plan of Inderpuri Colony; in terms of this revised layout EC-31 had ceased to exist. This Resolution had been passed under Delhi (Control of Building Operations) Act, 1955. The second resolution dated 14.7.1963 (Ex.PW-7/2) is of the Standing Committee of the
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Municipal Corporation of Delhi; this resolution relates to the development of Inderpuri Colony. It states that building plans would be sanctioned where the building activities are in conformity with the layout plan and if the owners pay a contribution towards the development done by the Corporation. The Resolution No.303 of the Standing Committee of the MCD dated 14.6.1965 (Ex.PW-7/1) states that the Colonizer will accept the entire responsibility for having suggested changes in the number of plots/blocks and will be responsible for litigation arising because of the change in the nomenclature of the plots.

12. The first suit i.e. the suit No.481/1965 had been filed by the plaintiff on 13.8.1965; the revised layout plan was in existence at that time. In this suit in para 9, the plaintiff has categorically mentioned that in August 1965 the plaintiff became aware that defendant no.1 Corporation had drawn out a revised layout plan; suit for permanent injunction had been filed against the MCD restraining them from interfering with the plaintiff's possession. This suit as aforementioned was decreed on 22.2.1967 on the statement of the counsel for the MCD that they would not interfere with the possession of the suit land unless the suit land is validly and lawfully acquired by them; defendant no.1/MCD had made a statement that this land had been earmarked for a school.

All this was well known to the plaintiff even before the filing of this first suit. At the time when the plaintiff filed the second suit in the year 1971 which six years later he deliberately and intentionally omitted to make the MCD a party; he also did not seek relief against the colonizer i.e. defendant no.2. This was clearly for the reason that defendant no.2 (colonizer) had written to all the plot holders including Bhagwan Devi (defendant no.3 and the successor-in-interest of the plaintiff and from whom the plaintiff claimed to have derived his title) vide letter dated 10.9.1963 that in the revised layout plan plot No.EC-31 has been omitted and the said plot has been earmarked for a primary school; the sale effected in favour of Bhagwan Devi on 22.8.1952 stands cancelled and nullified; she had been advised by defendant no.2 to take her compensation in lieu of this. This letter has been proved on record as Ex.D2W1/1. The subsequent letters dated 03.2.1979 and 08.3.1979 written by the MCD to the plaintiff also show that the plaintiff had been asked to quote the compensation which he wants for his plot i.e. Plot No.EC-31.

13. All this documentary evidence clearly establishes that even at the time of the filing of the first suit which was filed in the year 1965, the plaintiff was well aware that Plot No.EC-31 was no longer in existence. Revised layout plan (Ex.D1W3/1) which had

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been sanctioned on 09.10.1957 had omitted plot no.EC-31 along with plot nos.EC-28 to EC-30. This has been earmarked for a primary school. This first suit had been decreed on 22.2.1967 wherein the defence of the MCD that this plot has been earmarked for a school had been noted. Nevertheless even when the plaintiff chose to file his second suit which was filed in 1971 he did not make the MCD a party; he had sought relief against defendant no.1 only. Defendant no.2 has supported the case of defendant no.1; he has in his written statement stated that he had submitted the revised layout plan in terms of the new enactment i.e. the Delhi Development Act, 1957 and the Delhi Municipal Corporation Act 1957 which made it incumbent upon him to seek sanction of a layout plan before a building could be started. He has sent a communication dated 10.9.1963 to Bhagwan Devi informing her that the plot sold to her has now ceased to exist; she could be compensated in lieu of that. Plaintiff was well aware that a revised layout plan had been sanctioned by the MCD; he did not challenge this revised layout plan; he also did not make the MCD a party; his grievance was addressed to defendant no.1 only. Plaintiff was not a bonafide purchaser; in his capacity as PW-10 he had also admitted that he did not make any verification of the suit land from Bhagawn Devi from whom he is tracing his title; no

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verification had been done from her. Defendant no.1 had proved on record that he had purchased plot No.C-119 A vide his sale deed dated 11.8.1962 from defendant no.2 in terms of this revised layout plan; he had also obtained a sanction of his building plans on 05.4.1971. The sale deed in favour of the plaintiff dated 28.4.1959 has been proved as Ex.PW-6/1. This was a purchase made by the plaintiff from defendant nos.4 and 5 who in turn purchased it from defendant no.3. Rights of the plaintiff were bordered on the rights of defendant no.3. The sale deed in favour of defendant no.3 i.e. Bhagwan Devi is dated 22.8.1952. This has been proved on record as Ex.PW-3/A. It clearly stipulates that the vendee i.e. Bhagwan Devi had agreed to abide by the law of the appropriate authority and by "laws framed for building construction in this colony". This clause was rightly relied upon in the impugned judgment to draw a finding that the plaintiff who was claiming his title through Bhagwan Devi was also bound by the bye laws of the appropriate authority for building and construction in this colony. It is also not in dispute that the building bye-laws after coming into force of Delhi Development Act, 1957 and the Delhi Municipal Corporation Act, 1957 provided that since Inderpuri colony was in a "controlled" area; no building activity could be carried out unless the layout plan was

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sanctioned; in these circumstances the colonizer (the defendant no.2) had applied for the revised payout plan which had been sanctioned on 9.10.1957. Under Section 313(5) of the DMC Act no person could deal with any land or layout or otherwise than in conformity with the orders of the Standing Committee. Under Section 53(3)(b) of the Delhi Development Act, 1957 if permission for development has not been obtained such development shall not be deemed to be lawfully undertaken or carried out. It was thus incumbent upon the colonizer to have obtained a sanction of the layout plan which he did so and which was granted to him on 09.10.1957 in terms of the Resolution of the Standing Committee. Under Section 60(2)(b) of the said Act while repealing the Delhi (Control of Building Operations) Act, 1955, the saving clause stated that anything done or any action taken under the aforesaid Act in so far as it is not inconsistent with the provisions of this Act will continue in force and will be deemed to have been done under the provisions of this Act. This was the saving clause.

14. Record shows that in this revised layout plan of 09.10.1957 plot No.EC-31 has ceased to exist; plots no.EC-31 along with plot nos.EC-28 to EC-30 had been earmarked for the primary school. Purchase of this plot by the plaintiff on 28.4.1959 i.e. of a non-existent plot was a void purchase. Plaintiff can in no manner be

said to a bonafide purchaser.

15. The trial judge in fact vide order dated 4.9.1972 had vacated the ex parte interim injunction which had been granted in favour of the plaintiff and against the defendant. While vacating aforementioned injunction certain observation made by the trial judge are relevant; they inter alia read as follows:

“I have carefully considered the arguments of the learned counsel for the parties. As per documentary evidence produced, defendant No. 1 has prima facie proved that a revised layout plan was sanctioned whereby certain plots and roads were deleted and plots No. 116-A and 119-A were carved out of road. The validity of submitting revised plan by defendant No. 2 when he had already sold plots is to be determined when the case is tried on merits. The only point to be seen at this stage is whether any construction over plot C-119-A encroaches upon plot EC-31 or not. Injunction can only be granted if it is proved that the land of alleged plot EC-31 is being encroached upon. According to the plaintiff, road is 20” wide and defendant No. 1 is encroaching upon his land whereas defendant No. 1 states that it is 30” and the rest 10” he is leaving as set back as per plan sanctioned by Delhi Municipal Corporation, if latter portion is accepted, then even if the defendant is allowed to construct on the plot C-119-A, plaintiff is not going to suffer anything. The correspondence between defendant No. 1 and Delhi Municipal Corporation is pursuance of which water-pipe underneath plot C-119 A show that plaintiff never come in picture and never objected to the same and that defendant No. 1 is constructing as per plan sanctioned by Delhi Municipal Corporation.

So far as the enjoyment of road by plaintiff is concerned, there is not prima-facie case in favour of plaintiff at this stage in view of the sale deed dated 11.06.1962 and revised site plan of....

Filed, and correspondence between Delhi Municipal Corporation and defendant No. 1 regarding plot plan of C-119-A. In view of these the relief regarding enjoyment of road is not tenable. The sale deeds filed by the plaintiff are not specific about this enjoyment. The other portion of the relief sought, i.e. that defendant be from digging foundation, has already been infructuous as defendant has raised construction about plinth level.

Therefore, I am confining myself to the relief sought by plaintiff to the effect that defendant be restrained from interfering with the possession of the plaintiff plot EC-31 and from raising any construction thereon. Firstly, there is no plot EC-31 in the approved site plan. Secondly, the plaintiff does not appear to be in possession of the land in suit when defendant No. 1 is already raised construction upto plinth level and the remaining portion is stated to be included in the school premises. It is relevant to quote here the authority of AIR 1944 Madras, 221 which reads as follows:-

“To maintain a suit for mere injunction without a prayer for possession, if the plaintiff had not got possession of the property it would not be sufficient to show that he has constructive possession; there must be actual possession”

Thirdly, the learned counsel for the plaintiff had laid stress on the admission made by defendant in para 6 (vii) of the written statement to the effect that plot No. EC-31 has been included in the school premises. If that is the case, then the plot EC-31 is not being interfered by the constructions of plot C-119A. Further the plaintiff has nowhere stated specifically how much portion, if any, of plot EC-31 is being interfered by defendant No. 1. Further, in view of the fact that defendant is to lead 10 feet portion of his 40 feet wide plot as setback towards the site of the alleged plot No. EC-31, and the road out of which plot C-119A is stated to have carved out being 50 ft., it cannot be said that by allowing to continue the constructions, will deprive plaintiff of a portion of

his plot forever. Since the proposed construction is not going to injure any right of the plaintiff as the case shows at this stage, balance of convenience is also found in favour of defendant No. 1 and the plaintiff is not going to suffer any irreparable injury. In view of my discussions above, I vacate the ex-parte interim injunction granted by my learned predecessor.

16. The impugned judgment has also correctly noted that the suit is barred by limitation. Plaintiff even as per his own admission was aware in 1965 that the site has been earmarked for a school; in 1967 he had sought an injunction against the MCD; the same relief was sought against defendant no.1 in 1971. Impugned judgment had also noted that in an earlier suit no.243/52 plaintiff had appeared as witness (PW-3) and in his deposition of 08.11.1960 stated that he has the knowledge of the new layout plan of 1957; in the year 1960. Present suit filed in 1971 was time barred. Relevant extract of the impugned judgment qua this finding is extracted herein below:-

“c) In suit no. 243/52 between Vidyawati Goel Vs. E.I.L., the plaintiff appeared as PW3 and deposed on 8/11/1960 that he has the knowledge of new layout plan of 1957. Even if we recognized that date plaintiff could have filed the suit within 3 years of that date. Later on plaintiff filed another suit for permanent injunction on 13/8/65. The defendant E.I.L. as well as MCD filed W.S. stating about the layout plan of 1957 and further stated in the defence that plot no. EC-31 ceased to exist. This was the last time when plaintiff could have approached the appropriate forum for the redressal of his grievance. Plaintiff filed the suit in

the year 1971 stating that the defendant no.1 has encroached on his plot of land. The defendant no.1 purchased the plot no. C-119A on 11/8/62 and since then he is owner in possession. Later on defendant no.1 acquired sanctioned plan from the MCD and started construction. At that time of starting of the construction plaintiff alleged encroachment. There is no allegation that the defendant no.1/appellant encroached more area then plot C-119A. If the defendant no.1/appellant has not encroached the more area then given in plot C-119A then there is no encroachment.

d) Plaintiff claims to be owner of plot no. EC-31. It is a fact that this plot ceased to exist in 1957 layout plan. If he is neither owner nor in possession of any plot then there is no question of encroachment. Plaintiff states in the plaint that the defendant no.1/ Appellant has encroached on his plot EC-31, however EC-31 does not exist after 1957. There is also evidence on record dt.8/11/1960 of plaintiff as PW3 who stated that in the year 1960 he knew that his plot EC- 31 is in non-existence and now the plot has been earmarked for the MCD school. This shows that the plaintiff has not sought his remedy within time. The Permanent Injunction can be claimed within three years and all the years since been elapsed and apparently the suit of the plaintiff against the defendant is barred by time."

17. Powers of this court are circumscribed under Section 100 of the Code. Unless and until there is a perversity, interference is not permitted. No such perversity has been pointed out by the learned counsel for the appellant. Finding in the impugned judgment are in consonance with the evidence both oral and documentary. There is no perversity in the finding in the

impugned judgment. Substantial question of law is answered accordingly in favour of the respondent and against the appellant. There is no merit in the appeal. Dismissed.

INDERMEET KAUR, J.

APRIL 26, 2011
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